

MAY 14 1924

WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1924.

No. 940.

UNITED STATES & CUBAN ALLIED WORKS ENGINEERING
CORPORATION,

Plaintiff in error,

against

LLOYDS, a corporation, as Treasurer of Lloyds Underwriters Syndicate No. 601, Lloyds Underwriters Syndicate No. 462, Lloyds Underwriters Syndicate No. 305, Lloyds Underwriters Syndicate No. 495, Lloyds Underwriters Syndicate No. 237, Lloyds Underwriters Syndicate No. 655, Lloyds Underwriters Syndicate No. 66, Lloyds Underwriters Syndicate No. 485, Lloyds Underwriters Syndicate No. 276, Lloyds Underwriters Syndicate No. 800, Lloyds Underwriters Syndicate No. 400, Lloyds Underwriters Syndicate No. 75, and Lloyds Underwriters Syndicate No. 110, each Syndicate consisting of more than seven persons and each Syndicate transacting business as an unincorporated association of more than seven persons under the name and style of Lloyds Underwriters, otherwise known as Lloyds, otherwise known as Lloyds London, otherwise known as Underwriting Members of Lloyds,

Defendant in error.

On Writ of Error, transferred by U. S. Circuit Court of Appeals for the
Second Circuit, to U. S. Supreme Court.

MOTION TO DISMISS APPEAL OR REMAND TO CIRCUIT COURT.

INDEX.

	PAGE
Motion to Dismiss Appeal.....	1
Notice of Motion	3
Affidavit of Herbert Barry in Support of the Motion	6
Exhibit A—Order of District Court of the United States for the Southern District of New York, dated April 10, 1923....	11
Exhibit B—Writ of Error, dated October 11, 1923	13
Exhibit C—Assignment of Error, dated Oc- tober 10, 1923	15
Exhibit D—Order of Circuit Court of Ap- peals for the Second Circuit, transfer- ring case to United States Supreme Court, dated March 24, 1924.....	17

1
IN THE

Supreme Court of the United States.

UNITED STATES & CUBAN ALLIED WORKS
ENGINEERING CORPORATION,
Plaintiff in error,

AGAINST

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than seven persons and each Syndicate
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Underwriters, otherwise known as Lloyds,
otherwise known as Lloyds London, other-
wise known as Underwriting Members of
Lloyds,

2
No. 940
October Term,
1923

3
Defendant in error.

AND now comes LLOYD'S, a corporation, sued as
above named, appearing specially for the purpose
of this motion by Barry, Wainwright, Thacher &
Symmers, its counsel, and moves to dismiss with
costs the writ of error obtained by the above named

4 United States and Cuban Allied Works Engineering Corporation from the United States Circuit Court of Appeals for the Second Circuit, and transferred to this Court by order of the said United States Circuit Court of Appeals for the Second Circuit, filed and entered on the 24th day of March, 1924. This motion is made upon the ground that the order, to review which the writ of error was sought, was duly entered in the United States District Court for the Southern District of New York on the 11th day of April, 1923, and that the writ of error was not issued within the period required by the statute under which the writ of error was sought, nor was seasonably applied for, but was applied for on the 10th day of October, 1923, and issued on the 11th day of October, 1923; and therefore this Court has no jurisdiction of the same; and because the said writ of error is otherwise informal, irregular and insufficient, and the alleged assignment of error is informal, irregular and insufficient and that the record was not seasonably filed in this Court, and for other reasons apparent upon the face of said papers.

HERBERT BARRY,
ARCHIBALD G. THACHER,

Appearing specially for the purpose of this motion only as Attorneys for Lloyd's, a corporation sued as above named.

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES & CUBAN ALLIED WORKS
ENGINEERING CORPORATION,

Plaintiff in error,

AGAINST

LLOYDS, a corporation, as Treasurer of
Lloyds Underwriters Syndicate No. 601,
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Lloyds Underwriters Syndicate No. 305,
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transacting business as an unincorporated
association of more than seven persons
under the name and style of Lloyds
Underwriters, otherwise known as Lloyds,
otherwise known as Lloyds London, other-
wise known as Underwriting Members of
Lloyds,

No. 940
October Term
1923

Defendant in error.

SIR:

PLEASE TAKE NOTICE that upon the affidavit of
Herbert Barry hereto annexed, sworn to on the
28th day of April, 1924, and upon the record
before this Court, including particularly the

10 papers of which copies are hereto annexed, viz: the order of the District Court for the Southern District of New York, dated the 10th day of April, 1923, and the papers and proceedings therein recited, by which order it was provided:

“ORDERED that the service of the said summons and complaint on the said Harry K. Fowler and all the defendants herein by reason of the delivery of a copy of the same upon the said Harry K. Fowler, be and the same hereby is quashed.”

11 Also the writ of error issued thereafter from the U. S. Circuit Court of Appeals for the Second Circuit dated October 11th, 1923; and the assignment of error dated October 10th, 1923; and also the order of the said U. S. Circuit Court of Appeals entered and filed on the 24th day of March, 1924, directing that this cause be transferred to the Supreme Court of the United States; and upon the printed brief, a copy of which is herewith served upon you, we shall on Monday, the 19th day of May, 1924, or, if motions are not then heard, on the next succeeding motion day of this Court, make and submit to the Supreme Court of the United States at a stated term thereof to be held in the Capitol in the City of Washington, District 12 of Columbia, the motion, a copy of which is hereto annexed; and that we shall also then and there move said Court for an order dismissing the appeal herein, or in the alternative remanding the appeal to said Circuit Court of Appeals for the Second Circuit, because the order, to review which the writ of error was sought, was duly entered in the United States District Court for the Southern District of New York on the 11th day of April, 1923, and the writ of error was not issued within the period re-

quired by the statute under which the writ of error 13 was sought, nor was seasonably applied for, but was applied for on the 10th day of October, 1923, and issued on the 11th day of October, 1923, and therefore that this Court has no jurisdiction of the same; and because the said writ of error is otherwise informal, irregular and insufficient, and the alleged assignment of error is informal, irregular and insufficient, and that the record was not seasonably filed in this Court, and for other reasons which are apparent on the face of said papers, and that we shall then and there move for such other and further relief in the premises as may be just.

New York, April 28th, 1924.

14

Yours, etc.,

HERBERT BARRY,
ARCHIBALD G. THACHER,

Appearing specially for the purpose of this motion only as Attorneys for Lloyds, a corporation sued as above named,
No. 59. Wall Street,
Borough of Manhattan,
City of New York.

To:

WILLIAM OTIS BADGER, JR., Esq.,
Attorney for United States & Cuban
Allied Works Engineering Corporation,
Plaintiff in error,
79 Fulton Street,
New York City.

15

SUPREME COURT OF THE UNITED STATES.

UNITED STATES & CUBAN ALLIED WORKS
ENGINEERING CORPORATION,
Plaintiff in error,

AGAINST

LLOYDS, a corporation, as Treasurer of
Lloyds Underwriters Syndicate No. 601,
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110, each Syndicate consisting of more
than seven persons and each Syndicate
transacting business as an unincorporated
association of more than seven persons
under the name and style of Lloyds
Underwriters, otherwise known as Lloyds,
otherwise known as Lloyds London, other-
wise known as Underwriting Members of
Lloyds,

Defendant in error.

STATE OF NEW YORK, } ss.
County of New York, }

HERBERT BARRY, being duly sworn, deposes and
says that he is an attorney and counsellor at law
and a member of the Bar of the Supreme Court of

No. 940
October Ter
1923

the State of New York, and has been duly admitted 19 to practice before the Supreme Court of the United States. Deponent is a member of the firm of Barry, Wainwright, Thacher & Symmers, having offices at No. 59 Wall Street, City of New York, and that said firm appeared specially in behalf of the corporation Lloyd's, against whom, as alleged treasurer, the plaintiff in error above named attempted to bring an action in the District Court of the United States for the Southern District of New York.

The complaint was based upon a policy of marine insurance signed by individual underwriters at Lloyd's in the City of London, insuring a certain floating dry dock at Havana, Cuba. The complaint alleged in effect that the dry dock sank and was a total loss, and the plaintiff, a Delaware corporation, claimed as owner to be entitled to receive the amounts underwritten by the respective underwriters. 20

The complaint further contained allegations to the effect that the individual underwriters were doing business in groups constituting unincorporated associations, each consisting of more than seven persons, and the complaint also alleged that the corporation Lloyd's was the treasurer, or acting in the capacity of treasurer, of each of such alleged unincorporated associations. 21

It was not attempted in that action to serve the summons upon the individual underwriters, but on February 9, 1923, a copy of the summons dated February 5, 1923, together with a copy of the complaint, was delivered to Mr. Harry Keedwell Fowler, an agent of the corporation Lloyd's, with special duties, at No. 44 Beaver Street, in the City of New York.

22 A motion was made in behalf of the corporation Lloyd's appearing specially to have such attempted service declared null and void, and the principal ground urged was that service of process in an action *ex contractu* against non-resident individual defendants could not be validly made by delivery to some other person whom the plaintiff claimed to be empowered to receive such service in behalf of the individual defendants. The moving papers set out at some length the manner in which the insurance business is and has been conducted by underwriters at Lloyd's, in the City of London; that the policies constitute individual and separate but not joint contracts of the respective underwriters; and that the corporation Lloyd's is not the Treasurer and does not act in the capacity of Treasurer for the underwriters upon said policy or for any alleged association or associations of underwriters.

23

This motion was opposed by the plaintiff, challenging some of the statements made by the moving party, including the statement as to the functions of the corporation; and in behalf of the plaintiff it was claimed that effective service had been made under the provisions of a statute of the State of New York authorizing service to be made upon unincorporated associations consisting of more than seven members by delivery of process to the President or Treasurer of such association or the person acting in such capacity.

24

The motion was granted by an order of the District Court of the United States for the Southern District of New York, dated April 10, 1923, and entered, as deponent is informed, on the following day, which provided:

“ORDERED, that the service of the said summons and complaint on the said Harry K.

Fowler and all the defendants herein, by reason of the delivery of a copy of the same upon the said Harry K. Fowler, be and the same hereby is quashed." 25

A copy of such order is hereto annexed, marked Exhibit A.

Thereafter upon petition of the plaintiff, dated October 10, 1923, accompanied by an assignment of error dated October 10, 1923, a writ of error dated October 11, 1923, was issued directing that the record and proceedings be sent to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the City of New York, together with the writ, copies of which writ and of the allowance thereof and of the assignment of error are hereto annexed, marked Exhibits B and C. 26

Thereafter an order was made by the United States Circuit Court of Appeals for the Second Circuit dated March 24, 1924, directing that the cause be transferred to the Supreme Court of the United States, a copy of which order is hereto annexed, marked Exhibit D.

That as deponent is informed and believes, a copy of the record before the United States Circuit Court of Appeals for the Second Circuit, together with a copy of its said order of March 24, 1924, has been duly transmitted to the office of the Clerk of the Supreme Court of the United States, and is number 940 for the October Term, 1923. 27

That in behalf of the corporation Lloyd's, deponent's firm appeared specially in the District Court of the United States for the Southern District of New York, and likewise appeared specially for said corporation Lloyd's in the United States Circuit Court of Appeals for the Second Circuit. In behalf of said corporation Lloyd's, deponent, appearing

28 specially for the purpose of the motion only, desires to present a motion to the Supreme Court of the United States to dismiss the writ of error, or in the alternative to remand the same to the United States Circuit Court of Appeals, upon the following grounds:

That the writ of error was not issued within the period required by the statute under which such writ of error was sought, nor was it seasonably applied for, inasmuch as the order of the United States District Court for the Southern District of New York is dated the 10th day of April, 1923, and was entered on the following day, and the writ of
29 error bears date and was issued on the 11th day of October, 1923, and therefore that this Court has no jurisdiction of the same.

That the writ of error is otherwise in form irregular and insufficient; that the alleged assignment of error is informal, irregular and insufficient; and that the record was not seasonably filed in this Court; and for other reasons which are apparent on the face of said papers.

It is desired to move for such other and further incidental relief as may be just in the premises.

HERBERT BARRY

30 Sworn to before me, this 28th}
day of April, 1924. }

WILLIAM H. WILSON, JR.

Notary Public, Kings County No. 351
Certificate Filed in New York County No. 407
Commission Expires March 30, 1925

[NOTARIAL SEAL]

Exhibit A.**Order of April 10, 1923.**

At a Stated Term of the District Court of the United States for the Southern District of New York held in the Old Post Office Building, City of New York, on the tenth day of April, 1923.

Present: The Hon. LEARNED HAND, *District Judge.*

UNITED STATES & CUBAN ALLIED WORKS
ENGINEERING CORPORATION,

Plaintiff,

AGAINST

LLOYDS, a corporation, as Treasurer of Lloyds Underwriters Syndicate No. 601, Lloyds Underwriters Syndicate No. 462, Lloyds Underwriters Syndicate No. 305, Lloyds Underwriters Syndicate No. 495, Lloyds Underwriters Syndicate No. 237, Lloyds Underwriters Syndicate No. 655, Lloyds Underwriters Syndicate No. 66, Lloyds Underwriters Syndicate No. 485, Lloyds Underwriters Syndicate No. 276, Lloyds Underwriters Syndicate No. 800, Lloyds Underwriters Syndicate No. 400, Lloyds Underwriters Syndicate No. 75, and Lloyds Underwriters Syndicate No. 110, each Syndicate consisting of more than seven persons and each Syndicate transacting business as an unincorporated association of more than seven persons under the name and style of Lloyds Underwriters, otherwise known as Lloyds, otherwise known as Lloyds London, otherwise known as Underwriting Members of Lloyds,

L. 31
P. 35

Defendant.

An order to show cause having been granted herein why this Court should not "quash" service

34 of the summons and complaint in the above-entitled action hitherto obtained by delivering a copy on one Harry K. Fowler,

Now, on reading and filing the summons and complaint herein, together with such order and the affidavit of said Fowler, verified February 20, 1923, and the affidavits of James K. Symmers, Esq., verified the 19th day of February, 1923, and the exhibits thereto annexed, and on further reading the affidavits of William Otis Badger, Jr., verified the 27th day of February, 1923, and the affidavit of Francis R. Stoddard, Jr., verified the 26th day of February, 1923, and upon reading the copy of a 35 policy offered in evidence herein; and after hearing Herbert Barry, Esq., of counsel for defendant "Lloyds", appearing specially in support of the motion, and Joseph Thurlow Weed, Esq., counsel for the plaintiff in opposition thereto, and due deliberation having been had,

Now, on motion of Barry, Wainwright, Thacher & Symmers, attorneys for the defendant "Lloyds", it is

36 ORDERED that the service of the said summons and complaint on the said Harry K. Fowler, and all the defendants herein by reason of the delivery of a copy of the same upon the said Harry K. Fowler, be and the same hereby is quashed.

LEARNED HAND,
U. S. D. J.

Exhibit B.

37

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to
the Judges of the District Court of the United
States, for the Southern District of New York,

GREETING :

Because, in the record and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court, before you, or some of you, 38
between UNITED STATES & CUBAN ALLIED WORKS
ENGINEERING CORPORATION, PLAINTIFF AND PLAINTIFF
IN ERROR AND LLOYDS A CORPORATION, AS TREASURER
OF LLOYDS UNDERWRITERS SYNDICATE No. 601
AND OTHERS a manifest error hath happened to the
great damage of the said United States & Cuban
Allied Works Engineering Corporation as is said
and appears by its complaint, WE being willing
that such error, if any hath been, should be duly
corrected, and full and speedy justice done to the
parties aforesaid in this behalf, DO COMMAND YOU,
if judgment be therein given, that then under your
seal, distinctly and openly, you send the record
and proceedings aforesaid, with all things concerning
the same, to the Judges of the United States
Circuit Court of Appeals for the Second Circuit, at
the City of New York, together with this writ, so
that you have the same at the said place before the
Judges aforesaid, on the 10th day of November,
1923, that the record and proceedings aforesaid
being inspected, the said Judges of the United 39

40 States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable WM. H. TAFT, Chief Justice of the United States at New York City in the Southern District of New York, this 11th day of October in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-eight.

(L. 8.)

41

(Signed) ALEX GILCHRIST, JR.,

Clerk of the District Court
of the United States of
America, for the Southern
District of New York, in
the Second Circuit.

The foregoing writ is hereby allowed. October
11, 1923.

(Signed) LEARNED HAND,

U. S. District Judge.

(L. 31-35)

Exhibit C.

43

Assignment of Error.

UNITED STATES DISTRICT COURT,
 SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES & CUBAN ALLIED WORKS
 ENGINEERING CORPORATION,
 Plaintiff,

AGAINST

LLOYDS, a corporation, as Treasurer of
 Lloyds Underwriters Syndicate No. 601,
 Lloyds Underwriters Syndicate No. 462,
 Lloyds Underwriters Syndicate No. 305,
 Lloyds Underwriters Syndicate No. 495,
 Lloyds Underwriters Syndicate No. 237,
 Lloyds Underwriters Syndicate No. 655,
 Lloyds Underwriters Syndicate No. 66,
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 110, each Syndicate consisting of more
 than seven persons and each Syndicate
 transacting business as an unincorporated
 association of more than seven persons
 under the name and style of Lloyds
 Underwriters, otherwise known as Lloyds,
 otherwise known as Lloyds London, other-
 wise known as Underwriting Members of
 Lloyds,

44

45

Defendant.

Now comes the plaintiff by WILLIAM OTIS
 BADGER, Jr., and in connection with this petition

46 for writ of error says that in the records and proceedings and in the final judgment aforesaid manifest error has intervened to the prejudice of the plaintiff, to wit:

I. The Court erred in quashing the service of the said summons and complaint on Harry K. Fowler and all the defendants in the above entitled matter by reason of the delivery of a copy of the same upon said Harry K. Fowler.

Dated, October 10th, 1923.

WILLIAM OTIS BADGER, JR.,
Attorney for Plaintiff,
47 Office & P. O. Address,
No. 75 Fulton Street,
New York City.

Exhibit D.

49

Order of March 24, 1924.

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit held at the Court rooms in the Post Office Building in the City of New York on the 24th day of March, one thousand nine hundred and twenty-four.

Present:

Hon. CHARLES M. HOUGH,

50

Hon. MARTIN T. MANTON,

Hon. JULIUS M. MAYER,

Circuit Judges.

UNITED STATES & CUBAN ALLIED WORKS
ENGINEERING CORPORATION,
Plaintiff-in error,

vs.

LLOYDS, a corporation, as Treasurer of
Lloyds, etc.,
Defendant in error.

51

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States of the Southern District of New York; and

52 it appearing that the sole question is as to the jurisdiction of said district court;

Upon consideration thereof, it is

ORDERED that the above cause be transferred to the Supreme Court of the United States, and the Clerk of this Court is directed to transmit to the Clerk of the said Supreme Court, the original transcript of record and all other papers on file in this Court.

C. M. H.

M. T. M.

J. M. M.

MAY 14 1924

WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1923

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UNITED STATES & CUBAN ALLIED WORKS ENGINEERING
CORPORATION,

Plaintiff in error,
against

LLOYDS, a corporation, as Treasurer of Lloyds Underwriters Syndicate No. 601, Lloyds Underwriters Syndicate No. 462, Lloyds Underwriters Syndicate No. 305, Lloyds Underwriters Syndicate No. 495, Lloyds Underwriters Syndicate No. 237, Lloyds Underwriters Syndicate No. 655, Lloyds Underwriters Syndicate No. 66, Lloyds Underwriters Syndicate No. 485, Lloyds Underwriters Syndicate No. 276, Lloyds Underwriters Syndicate No. 808, Lloyds Underwriters Syndicate No. 400, Lloyds Underwriters Syndicate No. 75, and Lloyds Underwriters Syndicate No. 110, each Syndicate consisting of more than seven persons and each Syndicate transacting business as an unincorporated association of more than seven persons under the name and style of Lloyds Underwriters, otherwise known as Lloyds, otherwise known as Lloyds London, otherwise known as Underwriting Members of Lloyds.

Defendant in error.

DEFENDANT'S MOTION TO DISMISS WRIT OF ERROR, OR IN THE ALTERNATIVE
TO REMAND TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

HERBERT BARRY

ARCHIBALD G. THACHER

Attorneys and of Counsel, appearing specially for the
purpose of this motion only, for the CORPORATION
Lloyds, sued as above indicated.

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UNITED STATES & CUBAN ALLIED WORKS
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association of more than seven persons,
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otherwise known as Lloyds London, other-
wise known as Underwriting Members of
Lloyds,

Defendant in error.

**BRIEF ON MOTION TO DISMISS WRIT OF ERROR, OR
IN THE ALTERNATIVE TO REMAND TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

Statement.

The facts involved on this motion are simple. The plaintiff in error, who was also the plaintiff in the District Court, attempted to effect service of the summons and complaint by delivery of a copy to some one other than the individual defendants. Upon motion in the District Court an order was entered quashing this attempted service. This order was dated April 10th, 1923, and was entered on the following day.

On October 11, 1923, a writ of error to review this order was issued. No application was made nor writ of error issued within three months from the entry of the order of the District Court which plaintiff in error sought to have reviewed.

When the cause came on for hearing before the United States Circuit Court of Appeals for the Second Circuit, that court held that it had no jurisdiction in the premises and that review should have been sought in the United States Supreme Court.

Thereafter an order was entered by said Circuit Court of Appeals directing that the cause be transferred to the United States Supreme Court. The occasion for making this order is found in the provisions of the statute enacted September 14, 1922, which is in the following terms:

"If an appeal or writ of error has been or shall be taken to, or issued out of, any circuit court of appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court; or if an appeal or writ of error has been or shall be

taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a circuit court of appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

There can be no question that the application for the writ of error was taken long after the expiration of the period of three months within which the writ of error must have been secured for review in this court. Furthermore, it has been explicitly held by this Court that the provisions of the Act do not operate to extend this period of ninety days when a writ of error has been erroneously secured for review by the Circuit Court of Appeals.

In *McMillan Co. v. Abernathy*, 263 U. S. 438, this Court said (p. 443) :

"The time allowed by law for appeals from the District Court to the Circuit Courts of Appeals is in general six months (§ 11, Act of March 3, 1891, 26 Stat. 826, 829, c. 517) or double that allowed for appeals to this Court. We do not think the Act of 1922 applies to any case in which the appeal to the Circuit Court of Appeals is taken after the period for appeals to this Court has expired. Otherwise the act will enable one who negligently has allowed his right of appeal to this Court to go by, to take his appeal to the Circuit Court of Appeals and by transfer get into this Court, and thus lengthen the time for direct appeals to this Court from three to six months. This result we cannot assume Congress intended."

Under the authority of the decision above quoted it may be that the proper course is to remand this cause to the Circuit Court of Appeals, as was done in the case of *McMillan Co. v. Abernathy*, above quoted. The motion is, however, made in the alternative in order that the economy of time and labor of the courts will be thereby promoted if an order of dismissal may be granted and if this may properly be done under the rules and practice of this Court.

Respectfully submitted,

HERBERT BARRY,
ARCHIBALD G. THACHER,

Attorneys and of Counsel, appearing specially for the purpose of the motion only, for the corporation Lloyd's, sued as above indicated.

Dated, April 28, 1924.